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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 DANIEL SHAHAR, individually and on behalf)
of all others similarly situated,)

15 Plaintiff,)

16 v.)

17 HOTWIRE, INC., and EXPEDIA, INC.,)

18 Defendants,)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

Case No.: 12-cv-06027-JSW

**DEFENDANT HOTWIRE, INC.'S
MOTION TO DISMISS CLASS
ACTION COMPLAINT**

Date: May 3, 2013

Time: 9:00 a.m.

Dept: Courtroom 11, 19th Floor

Before: Honorable Jeffrey S. White

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1 **SUMMARY OF ARGUMENT**

2 Hotwire, Inc. (“Hotwire”) is an online travel company based in San Francisco. Plaintiff
3 Daniel Shahar used Hotwire’s website to reserve a rental car in Israel with Dollar Rent A Car
4 (“Dollar”). Plaintiff alleges that Hotwire estimated that the total price for the rental would be
5 \$70.00, but that once he arrived in Israel he was required by Dollar to pay taxes and mandatory
6 insurance costs that were not included in Hotwire’s estimate. Plaintiff alleges breach of contract
7 and violations of California consumer protection statutes, and seeks to represent the class of
8 consumers who used Hotwire to rent cars, reserve hotel rooms, or purchase airline tickets and
9 were charged more by the car rental agency, hotel, or airline than the amount Hotwire estimated
10 they would be charged.

11 Plaintiff’s claims regarding charges for airfare, for hotel rooms, and for car rentals in
12 countries other than Israel should be dismissed because plaintiff has not pleaded any facts
13 reflecting that airlines, hotels, or any car rental agencies other than Dollar in Israel imposed
14 charges on consumers that were not disclosed in advance by Hotwire. Plaintiff also lacks
15 standing to assert these claims because he did not contract for such services and was not injured
16 by any alleged practices pertaining to them. *See Carrea v. Dreyer’s Grand Ice Cream, Inc.*, No.
17 10-01044, 2011 WL 159380 (N.D. Cal. Jan. 10, 2011), *aff’d*, 475 F. App’x 113 (9th Cir. 2012)
18 (no standing to assert claims under California consumer protection statutes relating to product
19 plaintiff did not purchase).

20 At most, this case should be limited to claims arising from the alleged imposition of
21 undisclosed taxes and mandatory insurance fees by rental car agencies on consumers who used
22 the Hotwire service to rent cars in Israel. Even this limited claim should be dismissed, however,
23 because plaintiff’s contract with Hotwire clearly disclosed that the price on the reservation
24 confirmation was “estimated” and that the “final pricing will be determined by the car rental
25 agency” (here, Dollar). Further, plaintiff has not alleged that he suffered damages or lost money
26 or property as a result of Hotwire’s alleged conduct. For these reasons, even the claims based on
27 plaintiff’s car rental in Israel should be dismissed.
28

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on May 3, 2013, or as soon thereafter as the matter may be
4 heard, before the Honorable Jeffrey S. White of the United States District Court for the Northern
5 District of California, San Francisco Courthouse, Courtroom 11, 19th Floor, 450 Golden Gate
6 Avenue, San Francisco, CA 94102, defendant Hotwire, Inc. (“Hotwire”) will, and hereby does,
7 move to dismiss the Complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil
8 Procedure. This motion is based on this Notice of Motion and Motion, the Memorandum of
9 Points and Authorities set forth below, the accompanying declaration of Jessica L. Snorgrass
10 (“Snorgrass Decl.”) and attached exhibits, a Request for Judicial Notice, the [Proposed] Order,
11 the arguments of counsel, and any other matters properly before the Court.

12 **STATEMENT OF ISSUES (Civil L.R. 7-4(a)(3))**

13 1. Does the Complaint allege facts sufficient to state a claim under Rule 9(b) and/or
14 Rule 8(a) with respect to plaintiff’s allegations regarding services that he has never used?

15 2. Does plaintiff have standing to pursue claims on his own behalf or on behalf of a
16 nationwide class of consumers with respect to services that he never used?

17 3. Does the conduct alleged breach a contract or violate California consumer
18 protection statutes where plaintiff agreed that the allegedly misleading price was an “estimate”
19 and that the “actual” and “final pricing” would be determined by the rental car agency – and not
20 by Hotwire?

21 4. Does the Complaint allege facts sufficient to plead violations of California
22 consumer protection statutes if plaintiff has failed to plead facts demonstrating injury?

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **INTRODUCTION**

25 This is a purported consumer class action against Expedia, Inc. (“Expedia”) and Hotwire,
26 online travel companies that allow consumers to book travel services over the Internet.
27 According to his Complaint, plaintiff used the Hotwire website to reserve a rental car with Dollar
28 Rent A Car (“Dollar”) in Tel Aviv, Israel. Plaintiff alleges that the price that he ultimately was

1 charged in Israel *by Dollar* was substantially higher than the *estimated* price on his Hotwire
 2 reservation confirmation because Dollar included taxes and the cost of mandatory insurance that
 3 were not included in Hotwire’s estimate. Based on this one transaction with one rental car
 4 company in one country, plaintiff alleges (with no factual support whatsoever) that Hotwire
 5 “often misrepresents” airfare, hotel prices, and car rental prices throughout the world,
 6 “frequently enters into contracts with customers” that reflect estimated prices that are
 7 “significantly” lower than the amount the customer will be charged by the travel service provider
 8 (e.g., the car rental agency or hotel), and “routinely breaches” its contracts with its customers in a
 9 way that requires customers “to pay more than the agreed-upon price at the time they arrive at
 10 the airline counter, hotel, or car rental agency.” ¶¶ 11, 13, 21-22.¹ Plaintiff alleges breach of
 11 contract and the violation of California’s consumer protection statutes, and seeks to represent all
 12 Hotwire customers who paid more than Hotwire’s estimated price for air travel, a hotel stay, or
 13 car rental “due to additional charges imposed by the airline, hotel, or car rental company.” ¶ 23.

14 For the reasons explained below, the Complaint should be dismissed. With the exception
 15 of that aspect of plaintiff’s claim based on the extra charges Dollar required him to pay to rent a
 16 car in Israel (discussed below), this class action is based *entirely* on conjecture and unsupported
 17 speculation. Plaintiff has not alleged *any facts* reflecting that Hotwire omits mandatory fees and
 18 taxes from the reservation confirmations provided with airfare and hotel reservations, or for any
 19 car rental reservations other than plaintiff’s one reservation in Israel. For example, plaintiff does
 20 not identify even a single “additional charge imposed by [an] airline [or] hotel” that caused any
 21 consumer to pay more than the amount estimated on his or her reservation confirmation.
 22 Further, with respect to airfare and hotel reservations in particular, plaintiff ignores that Hotwire
 23 specifically discloses in its contracts with consumers that the airline or hotel may add certain
 24 additional fees. Given this contractual language, there could be no claim for breach of contract
 25

26
 27 ¹ All “¶” citations refer to the Complaint. As explained in Expedia’s separate motion to
 28 dismiss, plaintiff makes these same allegations against Expedia, even though he does not allege
 that he has ever transacted business with Expedia or used the Expedia website.

1 or violation of the consumer protection statutes even if plaintiff had pleaded facts demonstrating
2 that such fees were imposed by airlines or hotels.

3 Moreover, even if plaintiff had alleged facts reflecting that airlines, hotels, and car rental
4 companies other than Dollar in Israel charge consumers more than the amounts shown on
5 Hotwire's reservation confirmations, those claims would be subject to dismissal because plaintiff
6 lacks standing to pursue them. Plaintiff could not maintain a breach of contract action because
7 he did not enter into a contract with Hotwire for services relating to air travel or hotel stays, or
8 for a car rental other than the one rental in Israel at issue in the complaint. Plaintiff could not
9 maintain the claims for violations of California's consumer protection statutes because those
10 statutes limit standing to individuals who were exposed to and injured by a challenged practice.
11 Because plaintiff never used Hotwire to book air travel, a hotel room, or a rental car anywhere
12 except Israel, he lacks standing to pursue claims based on Hotwire's provision of such services.

13 Plaintiff also has failed to state a claim with respect to his car rental in Israel, because the
14 parties' contract stated explicitly that the displayed rate was an "estimate" and that Dollar (not
15 Hotwire) would determine the "actual charges" and "final pricing." Plaintiff also failed to plead
16 facts reflecting that he was injured by Hotwire.

17 For these reasons, Hotwire respectfully requests that the Complaint be dismissed.

18 **BACKGROUND**

19 **I. HOTWIRE AND ITS SERVICES**

20 Hotwire is an online travel company based in San Francisco. It operates a website,
21 www.hotwire.com, that allows consumers to make travel reservations – *e.g.*, purchase plane
22 tickets, book hotel rooms, or rent cars -- over the Internet. ¶ 7. Hotwire does not operate
23 airlines, hotels, or car rental agencies. ¶ 9. Rather, consumers use the Hotwire website to search
24 for and make reservations with the travel companies that do offer those services (*e.g.*, airlines,
25 hotel chains, rental car agencies). ¶¶ 7, 9. In this case, plaintiff alleges that he used the Hotwire
26 website to reserve a rental car with Dollar that he would pick up at the airport in Tel Aviv, Israel.

27 Every transaction through the Hotwire website requires the consumer to form a contract
28 with Hotwire. ¶¶ 13, 14, 15. Specifically, before a transaction can be completed, Hotwire

1 requires the consumer to expressly agree that the transaction is governed by Hotwire’s “terms
 2 and conditions” and its “Travel Products Rules and Regulations.” Ex. 1.² To do so, the
 3 consumer must affirmatively click a box on the Hotwire website acknowledging that “I have
 4 read, understand and accept the terms and conditions and Travel Products Rules and
 5 Regulations,” with hyperlinks to the actual policies and next to the capitalized word
 6 “**IMPORTANT.**” *Id.* The consumer cannot complete a transaction with Hotwire without first
 7 checking this “I have read . . .” box. Thus, before completing a transaction, every Hotwire
 8 customer (a) is required to expressly and affirmatively acknowledge that he or she has “read” the
 9 terms of conditions and Travel Products Rules and Regulations, “understand[s]” them, and
 10 “accept[s]” them; (b) is specifically directed to read the Terms and Conditions “closely”, and (c)
 11 is expressly told he or she “MUST NOT USE” the Hotwire website if he or she “does not agree
 12 with any part” of the Terms and Conditions. Exs. 1, 2. It is well-established that check-boxes
 13 with hyperlinks to the contractual text form binding contracts and put consumers on notice of the
 14 terms of the parties’ contractual relationship. *See, e.g., Swift v. Zynga Game Network, Inc.*, 805
 15 F. Supp. 2d 904, 911-12 (N.D. Cal. 2011) (providing a consumer with access to terms of service
 16 and requiring affirmative acceptance of the terms, even if terms are not presented on same page
 17 as an acceptance button, is sufficient to form a binding contract; clicking “Accept” button near
 18 hyperlink to terms of service and above statement that clicking button served as assent to terms
 19 formed a binding contract).

20 As Exhibits 2 and 3 reflect, Hotwire’s contracts with consumers include disclosures
 21 regarding prices. For example, with respect to standard rate car rentals – the type of transaction
 22

23 ² Exhibits (“Ex.”) are attached to the Declaration of Jessica L. Snorgrass, filed herewith. In a
 24 breach of contract case such as this one, the defendant can submit the contract itself for the
 25 Court’s consideration where, as here, the plaintiff failed to submit the contract with the
 26 complaint. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Certain pages from
 27 the Hotwire website, including the Terms and Conditions and the Travel Products Rules and
 28 Regulations, are attached as Exhibits 2 and 3 to the Snorgrass Declaration. Because they are an
 integral part of the contract referenced in the Complaint (¶¶ 8, 13, 15, 18, 19, 20) and form the
 basis of plaintiff’s allegations, the Court may consider these documents on a motion to dismiss.
Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds, Galbraith v.*
County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

1 in which plaintiff engaged -- Hotwire explains that it “calculates estimated charges based on the
 2 rental agency’s published rates, taxes and fees.” Ex. 3 at 2. Consumers are told that “[a]ctual
 3 rental charges are billed by the [car rental] agency” and that “[f]inal pricing will be determined
 4 by the rental agency.” *Id.* Consumers are also informed that their credit card is not charged at
 5 the time of booking, and they may cancel the reservation “at any time without penalty.” *Id.*³ For
 6 hotels, Hotwire explicitly discloses that “Hotwire rates do not include special fees charged by
 7 hotels upon check-out (e.g., energy charges, convention fees, resort fees, parking fees).
 8 Customers will be required to pay these fees directly to the hotels at check-out time.” *Id.* at 2.
 9 For airfare, immediately adjacent to the “book now” button consumers are shown disclosures
 10 under the heading “Know before you go” that include “Airlines may charge an additional fee for
 11 checked baggage” and “See complete fare rules for all the fare details you need.” Ex. 4. The
 12 displayed rate is also accompanied by a footnote disclosing that “Additional fees may apply for
 13 checked baggage, meals, or in-flight services.” *Id.*

14 **II. PLAINTIFF’S ALLEGATIONS**

15 On June 12, 2012, plaintiff used the Hotwire website to reserve a rental car from Dollar
 16 for five days in Israel. ¶ 15. Plaintiff does not allege that he used the Hotwire website at any
 17 other time or for any other reason, *i.e.*, to book airfare, reserve a hotel room, or make a rental car
 18 reservation for other dates or in other countries. With respect to the car rental in Israel, plaintiff
 19 alleges the parties’ contract included, among other terms, pick-up and drop off dates and
 20 location, a daily rate for the rental (\$14), the length of rental (5 days), a list of the estimated taxes
 21 and fees (\$0), and an estimated trip total amount (\$70). ¶ 15.

23
 24 ³ The Complaint reflects that plaintiff does not understand his own transaction with Hotwire.
 25 For example, he alleges that Hotwire “profits by charging its customer a higher price than it pays
 26 the airline, hotel or car rental agency for the services” and that plaintiff had “pre-paid” Hotwire
 27 for his rental car. ¶¶ 9, 18. Neither of these allegations is true. While there are types of
 28 transactions in which Hotwire marks up a rental car agency price before displaying the price to
 the consumer and in which Hotwire charges the consumer’s credit card, the standard rate car
 rental reservation made by plaintiff was not one of those instances. Plaintiff was charged only
 by Dollar in Israel -- he did not “pre-pay” Hotwire. Ex. 3 at 2 (consumers are not charged by
 Hotwire when making standard rate reservations through the Hotwire website).

Plaintiff admits that he was able to rent a car from Dollar for the agreed-upon rate of \$14/day when he arrived at the designated pick-up location (the Tel Aviv airport). ¶ 17. Plaintiff does not claim that any of the non-financial terms of the agreement were not satisfied. This case concerns only “the estimated taxes and fees” and “estimated trip total amount” displayed on the reservation confirmation he received from Hotwire. According to the Complaint, Hotwire estimated that the taxes and fees would be \$0 and therefore the total price would be \$70 (\$14/day x 5 days). Plaintiff claims that when he arrived at the rental car counter in Tel Aviv, Dollar required him to pay an additional \$60 for “3 PLC” insurance (which he does not describe), \$20.82 for “VAT taxes,” “8 cents for rounding currency,” and “1 cent for airport fee” for a total price of \$150.83 (\$70 + the additional fees). ¶ 17. Based on this one instance, plaintiff claims that Hotwire “frequently” “makes these misrepresentations in bad faith, knowing and intending that consumers will be deceived” regarding the true prices for air travel, hotel rooms, and rental cars. ¶¶ 11-13; *see also* ¶¶ 39, 48, 51.

The Complaint asserts causes of action for breach of contract (¶¶ 30-35) and for violations of California’s Consumers Legal Remedies Act (“CLRA”) codified at Cal. Civil Code § 1750 (¶¶ 36-44), False Advertising Law (“FAL”) codified at Cal. Bus. & Prof. Code § 17500 (¶¶ 45-49), and Unfair Competition Law (“UCL”) codified at Cal. Bus. & Prof. Code § 17200 (¶¶ 50-57). Plaintiff purports to represent everyone in the United States who made a reservation through Hotwire’s website during the last four years for air travel, a hotel stay, or car rental and received a confirmation from Hotwire that included a price, but then paid more than that price for the air travel, hotel stay, or car rental due to additional charges imposed by the airline, hotel, or car rental company – regardless of the reason such additional fees were imposed (*e.g.*, an upgrade or extra benefit requested by the consumer) and regardless of whether they were disclosed in advance by Hotwire. ¶ 23.

ARGUMENT

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556

U.S. 662 (2009). “Factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. “All allegations of material fact are taken as true and construed in the light most favorable to Plaintiffs. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) (citation omitted); *see also Twombly*, 550 U.S. at 555. Dismissal is proper if a complaint displays either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *City of Arcadia v. United States EPA*, 411 F.3d 1103, 1106 n.3 (9th Cir. 2005) (citation omitted); *Garcia v. Sony Computer Entm't Am. LLC*, 859 F. Supp. 2d 1056, 1061, 1066-67 (N.D. Cal. 2012) (citation omitted) (dismissing plaintiff’s UCL and CLRA claims with prejudice for failing to plead a cognizable or plausible legal theory).

Claims grounded in fraud are subject to the heightened pleading standards of Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125, 1127-28 (9th Cir. 2009) (dismissing UCL and CLRA claims under Rule 9(b)). Rule 9(b) requires that a “party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). “While fraud is not a necessary element of a claim under the CLRA and UCL, a plaintiff may nonetheless allege that the defendant engaged in fraudulent conduct,” and in that event the claim “as a whole must satisfy the particularity requirement of Rule 9(b).” *Kearns*, 567 F.3d at 1125 (citation omitted); *see also In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1075 (N.D. Cal. 2011) (Rule 9(b)’s heightened pleading standard applies to UCL, FAL, and CLRA claims). Here, plaintiff alleges Hotwire knowingly deceived consumers (§§ 12, 47) and, as a result, is required to plead those claims with particularity, including “‘the who, what, when, where, and how’ of the misconduct charged.” *Kearns*, 567 F.3d at 1124 (citation omitted).

Claims also may be dismissed if the Complaint fails to establish plaintiff’s standing to pursue them. *Thomas v. Mundell*, 572 F.3d 756, 760, 764 (9th Cir. 2009) (holding that standing is a threshold question in every federal case and affirming the district court’s dismissal of plaintiff for lack of standing); *Carrea v. Dreyer’s Grand Ice Cream, Inc.*, No. 10-01044, 2011 WL 159380 (N.D. Cal. Jan. 10, 2011), *aff’d*, 475 F. App’x 113 (9th Cir. 2012); *Murray v. Time*

1 *Inc.*, No. 12-00431, 2012 WL 3634387 (N.D. Cal. Aug. 24, 2012) (dismissing plaintiff's UCL
 2 claims for lack of Article III and statutory standing); *Johns v. Bayer Corp.*, No. 09-cv-1935,
 3 2010 WL 476688, at *5 (S.D. Cal. Feb. 9, 2010) (plaintiff lacked standing to pursue UCL and
 4 CLRA claims based on advertisements and product labeling that he did not allege he ever saw,
 5 read, or relied upon).

6 **I. PLAINTIFF'S ALLEGATIONS REGARDING SERVICES HE HAS NEVER**
 7 **USED MUST BE DISMISSED FOR LACK OF PARTICULARITY AND**
 8 **STANDING**

9 The Complaint includes factual allegations regarding only a single transaction: plaintiff's
 10 use of the Hotwire website to rent a car from Dollar in Israel. Those allegations are addressed in
 11 Section II, below. This Section I explains that plaintiff's claims regarding Hotwire's reservation
 12 service for air travel, hotel rooms, and car rentals in countries other than Israel – *i.e.*, the services
 13 that plaintiff did not use -- should be dismissed for two reasons.

14 First, these claims should be dismissed because the Complaint does not allege *any* facts
 15 reflecting that travel service providers – airlines, hotels, or car rental agencies other than Dollar
 16 in Israel – are imposing fees on consumers that are not disclosed in advance by Hotwire. If
 17 Hotwire fails to disclose such charges “often” and “frequently” as plaintiff alleges (§§ 11, 13),
 18 then presumably he should be able to identify at least one such charge. He has not. In fact, the
 19 allegedly mandatory fees that plaintiff claims to have been charged by Dollar in Israel are the
 20 *only* undisclosed fees identified in the Complaint.⁴ With respect to car rentals, the Complaint
 21 boldly asserts that Hotwire “breaches its contracts with *all* of its U.S. customers who use
 22 Hotwire's website to contract for cars to be picked up in Israel, as well as other foreign countries,
 23 including Costa Rica” (§ 20; emphasis added), but plaintiff does not plead *any* facts reflecting
 24 that car rental consumers in countries other than Israel are charged fees that are not disclosed in
 25 advance by Hotwire. Taxes and allegedly mandatory fees are likely to vary by country and by

26 ⁴ Even with respect to the largest component of the additional amount charged to plaintiff by
 27 Dollar in Israel, the so-called “3 PLC insurance” fee, plaintiff pleads no facts reflecting that is, in
 28 fact, “mandatory” for all consumers, as opposed to one of the “optional items” that a consumer
 may select “(e.g., insurance).” See Ex. 3 at 2.

1 travel service provider, and the Complaint provides nothing to suggest that plaintiff's experience
2 in Israel was not unique. Plaintiff provides no explanation for his reference to "Costa Rica."

3 With respect to airline and hotel reservations, Hotwire specifically informs consumers
4 that its prices do not include certain additional charges that may be imposed by the airline or
5 hotel. *E.g.*, Ex. 4 ("Additional fees may apply for checked baggage, meals, or in-flight
6 services"); Ex. 3 at 2 ("Hotwire rates do not include special fees charged by hotels upon check-
7 out (*e.g.*, energy charges, convention fees, resort fees, parking fees)"); *Ford v. Hotwire, Inc.*, No.
8 07-cv-1312, 2008 WL 5874305, at *4 (S.D. Cal. Feb. 25, 2008) (dismissing complaint with
9 prejudice; "Hotwire adequately discloses that resort fees may be imposed, such that a reasonable
10 customer is not likely to be deceived.").⁵ The Complaint does not identify *any* "additional
11 charges" allegedly imposed "at the airline ticket counter" or "hotel check-in desk" by the travel
12 service provider that are not disclosed in advance by Hotwire. ¶¶ 13, 23. Thus, these
13 allegations fall well-short of the "particularity" standards required by Rule 9(b). *Kearns*, 567
14 F.3d at 1125; *see also Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (Rule
15 9(b) requires plaintiff to plead the "specific content" of the false representations). Indeed, they
16 would not even meet the lesser pleading standards of Rule 8(a) because the allegations do not
17 rise above the "speculative level." *Twombly*, 550 U.S. at 545-46; *see also Carrea*, 2011 WL
18 159380, at *2 (plaintiff must plead facts that allow court to draw reasonable inference that
19 defendant is liable for the misconduct alleged). Plaintiff's allegations regarding the services he
20 did not use are *completely* speculative, because plaintiff does not allege that he or anyone else
21 has been charged -- or is even aware of -- an undisclosed additional fees charged by an airline,
22 hotel, or, in fact, any travel service provider other than Dollar Rent A Car in Israel.

23
24 ⁵ As currently defined, the class would include individuals who voluntarily agreed to pay
25 additional charges for additional services, including those services that Hotwire explicitly states
26 are not included in the prices it displays (*e.g.*, checked baggage or hotel parking). *See* ¶ 23
27 (defining class to include anyone who "paid more" due to "additional charges" imposed by
28 airline or hotel). The class therefore includes individuals who do not have a claim, rendering it
impermissibly overbroad. *See Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009)
(striking class allegations); *Lyons v. Bank of America, NA*, No. 11-1232, 2011 WL 6303390
(N.D. Cal. Dec. 16, 2011) (striking class allegations).

1 Second, even if the Complaint had alleged facts reflecting that airlines, hotels, and car
 2 rental agencies (other than Dollar in Israel) impose fees that are not disclosed in advance by
 3 Hotwire, plaintiff would lack standing to pursue his claims. Plaintiff lacks standing to assert a
 4 breach of contract claim because plaintiff never entered into a contract with Hotwire for air
 5 travel, for a hotel stay, or for a rental car in any country but Israel. Standing under the CLRA,
 6 FAL, and UCL is limited to named plaintiffs who were exposed to, relied on, and were injured
 7 by the alleged misconduct. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009) (a UCL
 8 plaintiff “must plead and prove actual reliance to satisfy the standing requirement”); Cal. Civ.
 9 Code § 1780(a) (only a “consumer who suffers any damage *as a result of*” a practice prohibited
 10 by the CLRA “may bring an action”) (emphasis added). Plaintiff does not allege that he ever
 11 relied upon, or was injured by, or was even aware of any misrepresentations or nondisclosures
 12 regarding the prices for air travel or hotel rooms and therefore lacks standing to pursue claims
 13 based on any such alleged misrepresentations or nondisclosures. *See Carrea*, 2011 WL 159380,
 14 at *3 (UCL claims relating to product that plaintiff did not purchase dismissed due to lack
 15 standing). With respect to car rentals, plaintiff’s rental of a car in Israel does not give standing to
 16 represent consumers who rented cars in other countries, because plaintiff has not pleaded that *he*
 17 was injured by any undisclosed taxes or fees in those countries. *Warth v. Seldin*, 422 U.S. 490,
 18 502 (1975) (to have standing, plaintiffs “must allege and show that they personally have been
 19 injured, not that injury has been suffered by other, unidentified members of the class to which
 20 they belong and which they purport to represent.”).

21 For these reasons, plaintiff’s claims regarding airfare, hotel bookings, and rental car
 22 reservations outside of Israel – *i.e.*, the services he did not use -- should be dismissed.

23 **II. PLAINTIFF’S ALLEGATIONS REGARDING HIS CAR RENTAL IN ISRAEL** 24 **DO NOT STATE A CLAIM**

25 **A. Plaintiff Has Failed To State a Claim for Breach of Contract**

26 Count I alleges that Hotwire breached its contract with plaintiff by “refusing” to provide
 27 him “with the contracted-for-services at the agreed-upon price.” ¶ 34. Plaintiff does not dispute
 28 that Hotwire provided the “agreed-upon” services – a car rental reservation with Dollar in Israel

1 for five days. ¶ 17. Plaintiff contends, however, that Hotwire failed to do so at “the agreed-upon
 2 price.” ¶¶ 14, 17, 34. According to plaintiff, the “agreed-upon price” consisted of
 3 a daily rate for the rental (\$14); “estimated” taxes and fees (\$0); and an “estimated” trip total
 4 amount (\$70). ¶ 15. Plaintiff concedes that he was charged the “daily rate for the rental (\$14)”
 5 ¶ 17. Therefore, the contract was only breached if Hotwire promised plaintiff that the price
 6 would not exceed Hotwire’s “estimated” total. Hotwire made no such representation. In fact, the
 7 contract at issue here expressly discloses:

- 8 • “Hotwire calculates estimated charges based on *the rental agency's published*
 9 *rates, taxes and fees.*”
- 10 • “*Actual* rental charges are billed by the agency”
- 11 • “*Final pricing will be determined by the rental agency*”

12 Ex. 3 at 2 (emphasis added). Thus, plaintiff was never promised that \$70 would be the total
 13 price. Instead, the contract provided that the “estimated charges” were “based on” “rates, taxes
 14 and fees” published by Dollar and that “actual rental charges” and “final pricing” would
 15 ultimately be determined by Dollar. Plaintiff does not allege any facts suggesting that Hotwire’s
 16 estimate was not “based on” information received from Dollar. Further, plaintiff cannot deny
 17 that the “actual” and “final” prices *were* determined by Dollar when plaintiff arrived in Tel Aviv,
 18 exactly as the contract provided. In other words, plaintiff received exactly what Hotwire agreed
 19 to provide – a confirmed car rental with Dollar in Israel for five days at \$14/day, with the “final
 20 pricing” to be determined by Dollar. Because Hotwire complied with its agreed-upon
 21 obligations, the Complaint fails to state a claim for breach of contract. *Mieuli v. DeBartolo*, No.
 22 C-00-3225, 2001 WL 777447, at *5 (N.D. Cal. Jan. 16, 2001) (contract claims should be
 23 dismissed “where it is clear from the unambiguous terms of the contract that the alleged conduct
 24 of the defendant does not constitute a breach of contract.”).

25 **B. Plaintiff Has Failed to State a Claim for Violations of California’s Consumer** 26 **Legal Remedies Act**

27 Count II alleges that Hotwire violated the CLRA, which prohibits the 25 practices set
 28 forth in Section 1770 of the Civil Code. Specifically, plaintiff alleges that Hotwire violated

subsections (a)(9), (a)(13) and (a)(14) of Section 1770. ¶ 39. Section 1770(a)(9) prohibits “[a]dvertising goods or services with intent not to sell them as advertised.” This allegation fails because Hotwire never “advertised” that plaintiff would pay a specific set price (\$70) for a rental car in Israel; as explained above, Hotwire expressly informed plaintiff that the total price was an “estimate” and the “actual” and “final price” would be determined by Dollar. Section 1770(a)(13) prohibits “[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.” Plaintiff fails to identify any such statements, and allegations regarding “price reductions” are found nowhere in the Complaint. Section 1770(a)(14) prohibits “[r]epresenting that a transaction confers or involves rights, remedies or obligations which it does not have or involve[.]” The Complaint fails to identify any such “rights, remedies or obligations,” however.

Plaintiff also alleges that Hotwire violated the CLRA because it failed to satisfy an alleged “duty to disclose the true charges” for its services. ¶ 40. This allegation cannot support a CLRA claim, however, because it is not tied to any subsection of Section 1770 that imposes such a duty. *See Kramer v. Intuit Inc.*, 121 Cal. App. 4th 574, 581 (2004) (affirming dismissal on demurrer where alleged misconduct did not violate an enumerated subsection); *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557 (2007) (unless a practice falls within the scope of one of the 23 listed practices, it does not violate the CLRA).

Finally, regardless of the facts pleaded, the CLRA claim must be dismissed because plaintiff failed to file the venue affidavit required by Civil Code § 1780(d). *See Castagnola v. Hewlett-Packard Co.*, No. 11-05772, 2012 WL 2159385, at *10-11 (N.D. Cal. June 13, 2012); *Apple & AT&T*, 802 F. Supp. 2d at 1077.

C. Plaintiff Has Failed to State a Claim for Violations of the FAL or UCL

Counts III and IV allege violations of the FAL and UCL, respectively. The FAL prohibits false advertising and the UCL prohibits business practices that are “fraudulent,” “unfair” or “unlawful.” *Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1817 (2011). Plaintiff alleges that Hotwire violated the FAL and UCL’s “fraudulent” prong by making “material misrepresentations regarding the cost of Hotwire’s

1 services[.]” ¶¶ 48, 53. As an initial matter, the “cost” of “Hotwire’s services” to plaintiff was
 2 \$0.00. Plaintiff paid Dollar, not Hotwire. Presumably, plaintiff meant to allege that Hotwire
 3 misrepresented the price plaintiff would pay Dollar because its estimate was wrong due to the
 4 additional fees imposed by Dollar. ¶ 17. Whether the estimate was false under the FAL or
 5 “fraudulent” under the UCL is evaluated under a reasonable consumer test. *Freeman v. Time,*
 6 *Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (“[T]he false or misleading advertising and unfair business
 7 practices claim must be evaluated from the vantage of a reasonable consumer.”) (citation
 8 omitted); *Castagnola*, 2012 WL 2159385, at *7 (“dismissal of [UCL and CRLA] claims is
 9 appropriate where the plaintiff fails to show the likelihood that a reasonable consumer would be
 10 deceived.”); *Carrea*, 2011 WL 159380, at *5 (same). Here, no reasonable consumer would
 11 believe that Hotwire’s “estimate” was the final amount he would be charged by Dollar.

12 Plaintiff, like all Hotwire customers, affirmatively acknowledged that he “read,
 13 understand, and accept[ed]” the Travel Products Rules and Regulations. Ex. 1. These Rules
 14 informed plaintiff that “actual charges are billed by,” and “[f]inal pricing” determined by, the
 15 rental car agency rather than Hotwire. Ex. 3 at 2. Thus, plaintiff knew that the “estimate”
 16 provided by Hotwire was not the “final” price, and that Dollar could impose additional fees.
 17 *Ford v. Hotwire* is particularly instructive on this point. In that case, a plaintiff alleged that
 18 Hotwire improperly failed to include “resort fees” in its hotel rates. Judge Huff of the Southern
 19 District of California dismissed plaintiff’s FAL and UCL claims because Hotwire “expressly
 20 states that its quoted rate does not include certain charges, such as resort fees, that a hotel may
 21 impose directly.” The Court concluded that “no reasonable consumer would be deceived and
 22 therefore that plaintiff’s complaint fails to state a claim for relief under the FAL or the
 23 ‘fraudulent’ conduct prong of the UCL.” *Ford v. Hotwire, Inc.*, No. 07-cv-1312, 2007 WL
 24 6235779, at *4 (S.D. Cal. Nov. 19, 2007). Judge Huff subsequently dismissed plaintiff’s
 25 amended complaint with prejudice. *Ford*, 2008 WL 5874305, at *9. Similarly, plaintiff here
 26 was not deceived. Given Hotwire’s disclosure that the “actual charges” and “final price” would
 27 be determined by Dollar, a reasonable consumer would not believe that Hotwire was promising
 28 that Dollar would not charge him additional fees when he arrived in Tel Aviv.

Plaintiff has also failed to state a claim under the UCL's "unfair" prong. ¶ 54. While California's appellate courts disagree on how to define "unfair" under the UCL, *Rubio*, 631 F.3d at 1204-05, plaintiff's claims fail even under the courts' lowest standard because it is neither contrary to public policy nor immoral, unethical, oppressive, or unscrupulous to list an estimated price on a reservation confirmation, especially where (as here) the consumer is expressly told that the "final" and "actual" price will be determined by a third party. *See Davis v. HSBC Bank Nevada*, 691 F.3d 1152, 1170 (9th Cir. 2012) ("unfair" prong not satisfied where defendant "warned that 'other restrictions might apply'" and in another document disclosed an annual fee). Plaintiffs' claims under the "unlawful" prong are based entirely on the alleged violations of the CLRA and FAL discussed above (¶ 52), and thus fail for the same reasons those claims fail.

D. Plaintiff Has Not Alleged the Required Injury or that He "Lost Money or Property"

To have standing under the UCL, FAL, or CLRA, a plaintiff must allege that he or she suffered an "injury in fact" and has "lost money or property" as a result of the alleged conduct. *E.g., Carrea*, 2011 WL 159380, at *2 (citation omitted). Plaintiff has not pleaded such facts.

The Complaint does assert that "Hotwire caused actual damage to Plaintiffs and the Class Members, including, inter alia, causing them to overpay for [their] services." ¶ 43. But simply alleging that Hotwire "has caused actual damage" is insufficient to create standing under the UCL, FAL or CLRA. *Animal Legal Def. Fund v. Mendes*, 160 Cal. App. 4th 136, 141 (2008) (conclusory allegation that plaintiffs "suffered harm and lost money as a result of" the challenged practice was inadequate to allege economic injury under UCL) (citation omitted). Plaintiff does not explain how he "overpaid" for the rental car. ¶ 43. On the contrary, the Complaint alleges that the taxes and fees were "mandatory" in Israel (¶ 17) meaning – if the allegation is true -- that plaintiff (and the alleged class members) had to pay those charges regardless how or from whom he rented a car in Israel. *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1591-92 (2008) (no economic injury if plaintiff does not plead facts showing he could have paid less). Similarly, the Complaint does not allege any facts supporting the contention that plaintiff "purchased services that [he] would not otherwise have purchased[.]" ¶¶ 49, 53. Plaintiff does

1 not allege that he would not have rented a car during his five days in Israel if he had known of
 2 Israel's allegedly mandatory taxes and fees. To the contrary, plaintiff alleges that he was told
 3 about the taxes and fees at the rental counter but, rather than cancel his reservation, he decided
 4 that he wanted a rental car at that price. ¶ 18.

5 The FAL and UCL claims also fail because the equitable remedy of restitution is the only
 6 monetary remedy authorized by these statutes. *See Gutierrez v. Wells Fargo*, -- F.3d --, 2012
 7 WL 6684748, at *2 (9th Cir. Dec. 26, 2012); *Castagnola*, 2012 WL 2159385, at *6 (dismissing
 8 UCL claim where plaintiff had not pleaded that defendant received fees from plaintiff). "Under
 9 the UCL, an individual may recover profits unfairly obtained" only if those profits "represent
 10 monies given to the defendant or benefits in which the plaintiff has an ownership interest."
 11 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148 (2003). Here, plaintiff did
 12 not pay Hotwire. Plaintiff used the Hotwire website to make a reservation with Dollar and then,
 13 when he picked up the car, *paid Dollar* for the car, taxes, insurance, and other fees. Plaintiff
 14 cannot look to Hotwire to recover the monies that went to Dollar under the guise of "restitution."
 15 *See Korea Supply*, 29 Cal. 4th at 1149 ("[a]ny award that plaintiff would recover from
 16 defendants would not be restitutionary as it would not replace any money or property that
 17 defendants took directly from plaintiff."); *Bradstreet v. Wong*, 161 Cal. App. 4th 1440, 1461
 18 (2008) ("[d]efendants cannot be required to return or restore to intervener something they never
 19 obtained.").

20 CONCLUSION

21 For the foregoing reasons, Hotwire respectfully requests that plaintiff's complaint be
 22 dismissed.

23 Dated: January 25, 2013

WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation

25 By: /s/ Rodney G. Strickland, Jr.
 Rodney G. Strickland, Jr.

26 Attorneys for Defendant
 27 Hotwire, Inc.

ECF CERTIFICATION

I, Jessica L. Snorgrass, am the ECF user whose identification and password are being used to file Defendant Hotwire, Inc.'s Motion to Dismiss Class Action Complaint. In compliance with General Order 45.X.B, I hereby attest that Rodney G. Strickland, Jr. has concurred in this filing.

Dated: January 25, 2013

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Jessica L. Snorgrass
Jessica L. Snorgrass